92-1709

Case No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

URBANO TORRES-LABRON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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A. QUESTION(S) PRESENTED

Whether the Court of Appeals for the Eleventh Circuit correctly applied the Court's "elements test" announced in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989), to the facts of the case wherein Mr. Urbano Torres,[1] a federal prisoner, was indicted for possession of a prohibited object, to-wit: a weapon,[2] and unsuccessfully sought to place into issue the included lesser offense of possession of a prohibited object, to-wit: an object which threatened the security or discipline,[3] 18 U.S.C. § 1791.

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[1]**Parties to the Proceedings**. The identities of the parties are stated in the style of the case.

[2]18 U.S.C. § 1791(d)(1)(B) - punishable by imprisonment up to five years under § 1791(b)(3).

[3]18 U.S.C. § 1791(d)(1)(F) - punishable by imprisonment up to six months under § 1791(b)(5).

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The Courts of Appeal, and in particular the Court of Appeals for the Eleventh Circuit, have misapplied the "elements test" of *Schmuck v. United States*; direction from the Supreme Court of the United States is appropriate in order that the recurring issue of lesser included offenses may be properly resolved in the first instance. 11

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Case No. _____

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October Term, 1992

URBANO TORRES-LABRON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Urbano Torres-Labron, by and through undersigned counsel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this cause on 25 November 1992 (rehearing denied 13 January 1993).

C. CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit was not published. A copy of the per curiam affirmance is reprinted in the Appendix, page 1.

D. JURISDICTION

1. **Dates.** The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on 25 November 1992. The Eleventh Circuit denied Petitioner's timely petition for rehearing on 13 January 1993.

2. **Statutory Provisions.** Petitioner asserted below, and asserts here, the deprivation of rights secured to him by the Constitution of the United States. Jurisdiction of the Supreme Court derives from 28 U.S.C. § 1254(1) and Rule 10.1, Supreme Court Rules.

E. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves interpretation of the "elements test" of lesser included offenses as enunciated in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). The facts of the case require application of the elements test to 18 U.S.C. § 1791.

The pertinent language of 18 U.S.C. § 1791 reads:

> § 1791. **Providing or possessing contraband in prison**
>
> (a) Offense.--Whoever--
>
> * * *
>
> (2) being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object;
>
> shall be punished as provided in subsection (b) of this section.
>
> (b) Punishment.--The punishment for an offense under this section is a fine under this title or--
>
> * * *
>
> (3) imprisonment for not more than 5 years, or both, if the object is specified in subsection

(c)(1)(B)[4] of this section;

* * *

(5) imprisonment for not more than 6 months, or both, if the object is specified in subsection (c)(1)(F)[5] of this section.

(d) Definitions.--As used in this section--

* * *

(1) the term "prohibited object" means--

* * *

(B) ammunition, a weapon (other than a firearm or destructive device), or an object that is designed or intended to be used as a weapon or to facilitate escape from a prison;

* * *

(F) any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual.

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[4]A scrivener's error carried through statutory revision; "(c)" should be "(d)." 99 Pub. L. 646.

[5]*See* footnote 4 above.

F. STATEMENT OF THE CASE

1. Course of the Proceedings Below

Urbano Torres-Labron was indicted on 09 April 1991 for an offense which occurred while he was an inmate at the Federal Correctional Institution (F.C.I.), Tallahassee, Florida. The indictment alleged that Mr. Torres did "knowingly possess a prohibited object, to-wit, a weapon." The statutory violation alleged was under 18 U.S.C. § 1791(a)(2).

From the opening of the trial (R2-29) through the requested jury instructions at the conclusion of the trial (R3-10; R1-21; RE 6-7), the defense asserted that the charge, possession of a prohibited object, to-wit: a weapon, included the lesser offense of possessing a prohibited object, to-wit: an object which threatened the order, discipline, or security of a prison, by an inmate in federal custody. *See* 18 U.S.C. § 1791(d)(1)(F). Post-trial the issue was again raised by Motion for New Trial (R1-28), Amended Motion for New

Trial (R1-30; RE 13), and briefed in a supporting memorandum of law (R1-35; RE 15). The trial judge consistently held that no lesser included offense was implicated *under the charge in the indictment*[6] and allowed no argument on a lesser included offense and no proof of a lesser included offense (R2-55). The defense specifically requested a jury instruction on a lesser included offense which was denied.[7]

During the charge conference defense counsel specifically requested the lesser included offense that the prohibited object threatened the order, discipline, or security of the prison as an appropriate charge (R2-158) [*See also* R1-

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[6]The pleading or indictment test.

[7]It was the defendant's position that the instrument in question, an alleged weapon, could be considered an "object that threatens order, discipline or security of a prison," therefore a lesser included offense under 18 U.S.C. § 1791(d)(1)(F). 18 U.S.C. § 1791(d)(1)(B) prohibited object-weapon punishable by 5 years consecutive imprisonment under 18 U.S.C. § 1791(b)(3); 18 U.S.C. § 1791(d)(1)(F) prohibited object punishable by 6 months consecutive imprisonment under 18 U.S.C. § 1791(b)(5).

21, RE 06]. The government objected to the requested charge. The trial judge held that because the government charged in the indictment that the prohibited object was a weapon, no lesser included offense was implicated (R2-161). The trial judge felt that even though the penalty was less and even though defense counsel had taken some of the witnesses through the litany of saying that the object threatened the order or discipline or security of the prison (R2-163), no lesser included offense was involved. Counsel also objected to the verdict form on the grounds that it did not include the lesser offense (R3-10). Over defense objections the jury was instructed without a lesser included offense (R1-25-7; RE 11) and shortly returned a verdict of guilty to the offense of possession of a weapon as charged (R1-27).

Mr. Torres was found guilty as charged in the indictment (R1-27). On 02 December 1991 Mr. Torres was sentenced to 39 months consecutive imprisonment together with three years supervised release. Notice of appeal was

timely filed on 03 December 1991 (R1-46) and the case proceeded on direct appeal to the Eleventh Circuit. The issue on appeal was whether Mr. Torres was entitled to present proof of a lesser included offense, whether Mr. Torres was entitled to argue to the jury his theory of a lesser included offense, and whether Mr. Torres was entitled to a lesser included jury instruction. Mr. Torres has expired his original sentence and is now serving the consecutive sentence imposed in this case.

2. Facts Pertinent to the Questions Presented

The Indictment charged:

> On or about February 6, 1991, in the Northern District of Florida, the defendant,
>
> Urbano Torres-Labron
>
> an inmate in the Federal Correctional Institution, Tallahassee, Florida, did knowingly possess a prohibited object, to wit, a weapon, in violation of Title 18, United States Code, Section 1791(a)(2).

It was the contention of Petitioner Torres from opening statement through trial, and appeal, that the charge contained the lesser-included offense of "possession of a prohibited object, to wit: an object which threatened the order, discipline, or security of a prison, or the life, health, or safety of an individual." 18 U.S.C. § 1791(d)(1)(F). The issue was raised in opening statement (R2-29) and preserved by timely objection, timely requests, timely proffer, timely requested jury instructions (R2-158; R3-3), timely objection to the verdict (R3-10), timely motion for new trial with specific reliance on *Schmuck v. United States, supra* (R1-28; R1-30; R1-35). The defendant was convicted by the jury (R1-27) and received a consecutive 39 month sentence rather than a consecutive six month sentence (R1-45), which was the maximum if he had been convicted of the lesser included offense.

On appeal to the Court of Appeals the sole issue was stated as whether "Possession of a prohibited object which

threatens the order, discipline, or security of a prison by a federal inmate is a lesser included offense of possession of a prohibited object-weapon by a federal inmate."

G. REASONS FOR GRANTING THE WRIT

THE COURTS OF APPEAL, AND IN PARTICULAR THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, HAVE MISAPPLIED THE "ELEMENTS TEST" OF *SCHMUCK V. UNITED STATES*;[8] DIRECTION FROM THE SUPREME COURT OF THE UNITED STATES IS APPROPRIATE IN ORDER THAT THE RECURRING ISSUE OF LESSER INCLUDED OFFENSES MAY BE PROPERLY RESOLVED IN THE FIRST INSTANCE.

The specific issue on review is whether the charge possession of a prohibited object, to-wit: a weapon,[9] by a federal inmate includes the lesser offense of possession of a prohibited object, to-wit: one which threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual.[10] In a broader context the issue is whether the Courts of Appeal, and specifically the Court of

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[8]*Schmuck v. United States*, 489 U.S. 705; 109 S. Ct. 1443, 1453; 103 L. Ed. 2d 734 (1989)

[9]18 U.S.C. § 1791(d)(1)(B).

[10]18 U.S.C. § 1791(d)(1)(F).

Appeals for the Eleventh Circuit, correctly applied the teaching of the Court in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989), wherein the Court adopted the "elements tests," which holds that an offense is a necessarily lesser included offense if its elements are a subset of the elements charged in the indictment.

H. ARGUMENT AND CITATIONS

The Indictment (R1-1; RE 05) charged that Mr. Torres "did knowingly possess a prohibited object, to wit, a weapon, in violation of Title 18, United States Code, Section 1791(a)(2)." 18 U.S.C. § 1791(a)(2) proscribes that whoever "being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object; shall be punished as provided in subsection (b) of this section."

It is the position of Appellant Torres that 18 U.S.C. § 1791(a)(2) contains definitional subsets,[11] specifically the definitional subdivisions of § 1791(d)(1)(B) which proscribes weapons (and ammunition, or an object that is designed or intended to be used as a weapon or facilitate escape from a

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[11] *Schmuck v. United States*, 489 U.S. 705, 716; 109 S. Ct. 1443, 1450; 103 L. Ed. 2d 734 (1989).

> Under this test, one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense.

prison) and § 1791(d)(1)(F) which proscribes "any other object that threatens the order, discipline, security of a prison, or the life, health, or safety of an individual." [*See also* § 1791(d)(1)(A) - (firearm or destructive device)].[12] Since all weapons within a prison threaten life, health, or safety of an individual, the elements of the lesser offense are an included subset of a weapon or object which has the capability of being used to threaten or injure another person (R1-25-7).

1. The inherent relationship test.

Most courts, state and federal, have adopted one of three tests to determine when, assuming a proper evidentiary showing, an offense not otherwise specifically charged may be deemed a lesser included offense of another, greater offense charged. *See generally State v. Dordain*, 566 A.2d 942, 945-48 (R.I. 1989). The most expansive of the three

[12] *Cf.* § 1791(d)(1)(C) [narcotic drug] and § 1791(d)(1)(D) [other controlled substance].

tests is the "inherent relationship" test. A leading case adopting this test is *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971):

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offenses is necessarily presented as part of the showing of the commission of the greater offense.

Id., 447 F.2d, at 319. The Ninth Circuit also adopted the inherent relationship test, *United States v. Martin*, 783 F.2d 1449, 1451 (9th Cir. 1986), as have some state courts. *E.g.*, *Dordain*, 566 A.2d, at 947-48 (reaffirming inherent relationship test and rejecting on state law grounds).

2. The statutory elements test.

The most restrictive approach is the "statutory elements" test. Under this test, an offense is not lesser included unless each statutory element of the lesser offense is also present in the greater offense. For this purpose, the comparison of the statutory elements between the lesser and greater offenses parallels the statutory elements analysis conducted under *Blockburger v. United States*, 284 U.S. 299; 52 S. Ct. 180, 182; 76 L. Ed. 306 (1932), for double jeopardy purposes. The statutory elements test is simple to apply and has attracted a strong following in the courts. *E.g. Government of Virgin Islands v. Joseph*, 765 F.2d 394, 396 (3d Cir. 1985); *United States v. Campbell*, 652 F.2d 760, 761-62 (8th Cir. 1981); *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986); *State v. Cimino*, 126 N.H. 570, 575-76, 493 A.2d 1197, 1202 (1985); *State v. Spearin*, 477 A.2d 1147, 1158 (Me. 1984).

3. The pleading or indictment test.

An intermediate approach is the "pleading" or "indictment" theory used in several states. This approach allows a jury to consider a lesser offense if that offense is contained within the language of the indictment or information as the means by which the charged greater offense was committed. *See, e.g., Dorsey v. State*, 490 N.E.2d 260, 268 (Ind. 1986) (instruction on lesser offense unnecessary if lesser offense not contained in information); *State v. Madrid*, 108 Idaho 736, 702 P.2d 308, 309-10 (1985) (lesser offense alleged in indictment as means of committing greater); *State v. Marino*, 190 Conn. 639, 653, 462 A.2d 1021, 1029 (1983).

The Eleventh Circuit below has endorsed the pleading or indictment based elements test. During argument before the district court, the trial judge clearly applied the indirect based elements test.

THE COURT: No, they didn't say -- the

> government didn't charge that it was either a weapon or an object that is designed or intended to use -- to be used as a weapon, or to facilitate escape from a prison. (R2-49).
>
> * * *
>
> THE COURT: But here the government sought to limit the definition of a prohibited object to a weapon. And I'm not obliged to say that this could be ammunition, or that this could be an object that is designed or intended to be used as a weapon or to facilitate escape from a prison. *We have to take the indictment as the United States signed off on, and as the grand jury foreman endorsed.* (emphasis added; R2-51).

4. The elements test.

In *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989), the Supreme Court adopted what it characterized as an "elements" test in resolving a circuit conflict over how lesser included offenses were to be determined under the "necessarily included" standard of Rule 31(c). *Id.*, 109 S. Ct., at 1450.

Taken as a whole, the language of *Schmuck* indicates that it adopts a strict statutory elements approach to the

question of lesser included offenses. In *Schmuck*, the Court quotes with approval the following language from *Giles v. United States*, 144 F.2d 860 (9th Cir. 1944): "'"To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser."'" 144 F.2d, at 861 (quoting *Housing v. State*, 186 Ind. 593, 595-96; 117 N.E. 647, 648 (1917)), quoted in *Schmuck*, 109 S. Ct., at 1452. *Schmuck* also quotes with approval *People v. Kerrick*, 144 Cal. 46, 47, 77 Pac. 711, 712 (1904), in which the California Supreme Court explained that "'[t]o be "necessarily included" in the offense charged, the lesser offense must not only be part of the greater in fact, but it must also be embraced within the *legal definition* of the greater as a part thereof.'" 109 S. Ct., at 1452 (emphasis added). The Supreme Court contemplates a "textual comparison of criminal statutes" to determine whether the elements of the lesser offense are "a subset of the elements" of the greater offense, and its

analysis and language do not appear to contemplate (or leave open the possibility of) an examination of an indictment to narrow the scope of a statute. 109 S. Ct., at 1452-53. Moreover, as the Court recognized in *Schmuck*, Rule 31(c), Federal Rules of Criminal Procedure, was intended to be a restatement of prior law. *Schmuck*, 109 S. Ct., at 1452; *Berra v. United States*, 351 U.S. 131; 76 S. Ct. 685, 688; 100 L. Ed. 1013 (1956); Fed. R. Crim. P. 31(c), Advisory Committee Note. The Court concluded that the prevailing approach at the time of the adoption of Rule 31(c) in 1977 — at least in federal courts — was the statutory elements test. *Schmuck*, 109 S. Ct., at 1452; *see also Theriault v. United States*, 434 F.2d 212, 214 (5th Cir. 1970), *cert. denied*, 404 U.S. 869, 92 S. Ct. 124, 30 L. Ed. 2d 113 (1971).

At least two Circuits have implicitly rejected the interpretation of *Schmuck* as an indictment based theory, and none have endorsed it. *United States v. Mena*, 933 F.2d 19, 29-30 (1st Cir. 1991) (boarding an aircraft with an explosive

or incendiary device not a lesser included offense of air piracy; accordingly, a lesser included offense instruction was not required and indictment and cumulative punishment for both offenses in one prosecution was permissible; analysis only on basis of statutory elements, not indictment wording); *United States v. Sneezer*, 900 F.2d 177, 178-79 (9th Cir. 1990) (abusive sexual contact not a lesser included offense of attempted sexual abuse or aggravated sexual abuse; statutory elements analyzed, no reference to language of indictment).

In the case below the court misapplied the elements test announced in *Schmuck*. The issue is not unique. *See United States v. Gregory*, 891 F.2d 732 (9th Cir. 1989) [holding bank larceny, 18 U.S.C. § 2113(b), is not a lesser included offense of bank robbery, 18 U.S.C. § 2113(a)]. The elements test is not being questioned. The uniformity of its application is not consistent. Therefore to cases like *United States v. Horn*, 946 F.2d 738, 744-45 (10th Cir. 1991), wherein the Tenth Circuit applied the *Schmuck* test to

hold that possession, possession with intent to distribute and distribution are not lesser included offenses of conspiracy, Petitioner takes no exception. But to a case where the evidence at trial sustains the existence as fact a subset of the statutory elements of the charge specified in the indictment, a lesser included offense is established as a matter of law.

There is also some tension between double jeopardy analysis and the analysis of lesser included offenses for instructional purposes. Traditional *Blockburger* double jeopardy analysis mirrors the statutory elements test used to determine when an offense is lesser included in a greater offense for the purpose of a jury instruction. Courts often cite cases applying the elements test to determine lesser included offenses for jury instructional purposes and double jeopardy purposes interchangeably. *See, e.g., United States v. Schmuck*, 840 F.2d 384, 390 (7th Cir. 1988) (en banc). *Cf. Mena*, 933 F.2d, at 29-30. The Supreme Court has made clear, however, that the traditional *Blockburger* test is no

longer the sole test to determine whether jeopardy has attached for one offense after final conviction or acquittal for another. The Supreme Court reaffirmed in *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), that prosecution is still barred if the elements are the same, or one is a lesser included offense of the other, applying traditional *Blockburger* double jeopardy analysis. *Id.*, 110 S. Ct., at 2090. The Court further held in *Grady*, however, that the Double Jeopardy Clause also bars "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*, 110 S. Ct., at 2093; *see also Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977); *Davis v. Herring*, 800 F.2d 513, 517-19 (5th Cir. 1986).

The practice of allowing instructions on lesser

included offenses "'developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged,'" *Schmuck,* 109 S. Ct., at 1451 n.9 (quoting *Beck v. Alabama,* 447 U.S. 625; 100 S. Ct. 2382, 2387; 65 L. Ed. 2d 392 (1980), "'it is now firmly established that Rule 31(c)'s provision for lesser offense instructions benefits the defendant as well.'" *Schmuck,* 109 S. Ct., at 1451 n.9. Where the jury concludes that the defendant is obviously guilty of some crime, but one of the elements of the charged offense remains in some doubt, the concern is that in the absence of a lesser included offense instruction, the jury may fail to give full effect to the reasonable doubt standard and resolve its doubts in favor of conviction. *Keeble v. United States,* 412 U.S. 205; 93 S. Ct. 1998, 1997-98; 36 L. Ed. 2d 844 (1973). Because a strict statutory elements test for lesser included offenses lessens the availability of lesser included offense instructions, such a standard reduces the protection that the availability of lesser

included offense instructions is intended to afford to the criminal defendant.

Federal Rule of Criminal Procedure 31(c) provides that a "defendant may be found guilty of an offense necessarily included in the offense charged...."[13] While the lesser included offense instruction rule originally developed to aid the prosecution in cases in which its proof failed to establish all the elements of the charged offense, it is now settled that a defendant has a procedural right to a lesser included offense instruction in an appropriate circumstance. *United States v. Crutchfield*, 547 F.2d 496, 499 (9th Cir. 1977). The concern is that a jury may convict a defendant of the crime charged, even though the prosecution may not have proved all of its elements, because the jury believes the defendant committed some lesser crime but is faced with the

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[13]The terms "lesser included" and "necessarily included" are used interchangeably by most courts and Rule 31(c) encompasses both. *See United States v. Johnson*, 637 F.2d 1224, 1233 n.12 (9th Cir. 1980); *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir. 1969).

limited alternative of either convicting the defendant of the crime charged or setting him free. In such a case, it is likely the jury will "fail to give full effect to the reasonable doubt standard [and, instead,] resolv[e] its doubts in favor of conviction." *Schmuck v. United States*, 489 U.S. 705, 717 n.9; 109 S. Ct. 1443, 1451 n.9; 103 L. Ed. 2d 734 (1989) (citing *Keeble v. United States*, 412 U.S. 205, 212-13; 93 S. Ct. 1993, 1997-98; 36 L. Ed. 2d 844 (1973)). Such an eventuality has been realized in Mr. Torres' trial where the case was consistently and persistently prosecuted with no lesser (included) alternative.

I. CONCLUSION

It is submitted the case should be reviewed on the merits.

The writ of certiorari should be granted, and that relief is respectfully requested.

J. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Anthony J. Jenkins
Assistant United States Attorney
315 S. Calhoun Street, Suite 510
Tallahassee, Florida 32301

by hand/~~mail~~ delivery this 13th day of April, 1993.

Respectfully submitted,

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